

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 727-2293

DOUGLAS ALBERT &  
FIVE OTHERS,  
*Appellants*

v.

Docket Nos.: (See Below)

LEOMINSTER SCHOOL DEPARTMENT,  
*Respondent*

<u>CSC Case No.</u>	<u>Appellant</u>	<u>Civil Service Permanency</u>
G2-11-20	Douglas Albert	Senior Building Custodian
G2-11-21	Dennis Martin	Junior Building Custodian
G2-11-22	Virgilio Catalano	Senior Building Custodian
<sup>1</sup> G2-11-23	John Quigley	Junior Building Custodian
G2-11-24	Scott Lancianni	Junior Building Custodian
G2-11-25	Daniel Evans	Junior Building Custodian

Appellants' Representative:

Melinda Willis, Esq.  
AFSCME Council 93  
8 Beacon Street  
Boston, MA 02108

Respondent's Representative:

Ann Marie Stoica  
Director of Human Resources  
Leominster Public Schools  
24 Church Street  
Leominster, MA 01453

Commissioner:

Christopher C. Bowman

INTERIM ORDER

The Appellants in this case are employees of the Leominster School Department, three of whom are permanent junior building custodians and two of whom are permanent senior building custodians. They argue that they are aggrieved individuals as a result of the City's

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<sup>1</sup> The parties stipulated that Mr. Quigley did not assent to filing an appeal regarding this matter and wished to have his appeal withdrawn.

decision to provisionally promote an individual to the position of senior building custodian who is not a permanent civil service employee (William Rodriguez).

A pre-hearing conference was held on February 15, 2011 and a status conference was held via teleconference on March 1, 2011.

It is undisputed that, at the time the senior building custodian position was posted on June 3, 2010, William Rodriguez was a provisional junior building custodian. According to the School Department, he was hired as a provisional junior building custodian sometime in calendar year 2000. According to HRD, Mr. Rodriguez took, but failed the civil service examination for junior building custodian on May 17, 2003. The School Department argues that it was under the mistaken impression that Mr. Rodriguez became a permanent junior building custodian in 2004. On the contrary, G.L. c. 31, § 14 states that “ ... no provisional employment in a position shall be ... continued ... for more than thirty days following a certification from an eligible list if such list contains the names of three persons eligible for and willing to accept appointment to such position.” Simply put, it appears that Mr. Rodriguez’s employment as a junior building custodian should have been terminated after he failed the civil service examination in 2004.

On June 3, 2010, the School Department posted a vacancy for the position of senior building custodian. The School Department argues that this vacancy was filled as a provisional appointment under G.L. c. 31, §12. The Appellants argue that the vacancy was filled as a provisional promotion under G.L. c. 31, § 15. The distinction is significant. Provisional promotions are limited to permanent civil service employees, such as the Appellants, while provisional appointments are not. See Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23

MSCR 534 (2010); Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009) [*Pease I*]; Poe v. Department of Revenue, 22 MCSR 287 (2009) [*Poe I*]; Garfunkel v. Department of Revenue, 22 MCSR 291 (2009) [*Garfunkel I*]; Glazer v. Department of Revenue, 21 MCSR 51 (2007); Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007).

Applied here, if the vacancy was filled via a provisional *promotion*, only those Appellants holding permanency in the next lower title of junior building custodian, would be eligible for said promotion to senior building custodian if they are otherwise “qualified.” Mr. Rodriguez fails to meet the statutory prerequisite to be provisionally promoted pursuant to Section 15 to the position of senior building custodian. Thus, if this is deemed to be a provisional promotion, those Appellants holding permanency in the next lower title of junior building custodian, if “qualified” for senior building custodian position, would be entitled to be selected for the open position filled by Mr. Rodriguez – and would be aggrieved by their non-selection. If they were unqualified, however, they would not be entitled to relief. See Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MCSR 534 (2010); Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009).

As part of the status conference, the School Department argued that, even if the Commission determined that the vacancy was filled via a promotional promotion, the three Appellants holding permanency in the next lower title were “not qualified” for the supervisory position of senior building custodian.

In regard to those Appellants holding permanency as *senior* building custodians, they are not entitled to any relief, even if the position was posted and filled as a provisional promotion. The Appellants holding permanency as senior building custodians can not claim rights under Section 15 because they do not meet the standards for being promoted under it. Their appointment would be neither “provisional” nor a “promotion”. They are not “civil service employee[s] in one title [seeking to go to] the next higher title...” G.L. c. 31, § 15. See Mosesso v. Department of Transitional Assistance, 23 MCSR 43 (2010).

While it is possible that the last paragraph of G.L. c. 31, § 35 may apply here, the Appellant would not prevail under that section of the statute either. The last paragraph of Section 35 states:

“Any permanent employee in a departmental unit...may apply in writing to the appointing authorities for such unit and for any other unit for transfer to a similar position in such other departmental unit. **With the written consent of such appointing authority or authorities, as the case may be, and with the written consent of the administrator**, such person may be so transferred. (emphasis added)”

Although G.L. c. 31, §35 grants permanent employees the right to seek a transfer from one civil service position to another, it does not oblige appointing authorities and the administrator to make such a transfer. See Ho, Pepicelli and O'Connor v. City of Cambridge and Human Resources Division (20 MCSC 96, 97 (2007)) citing Cooper v. Civil Service Commission, 314 Mass. 76, 79 (1943) (“The statutes do not confer upon a person within the classified civil service the right to be transferred from one office or employment to another.”) In Cooper, the appointing authority first requested that the appellant be transferred, but subsequently failed to challenge the Civil Service Director’s (a comparable title to today’s Personnel Administrator) refusal to permit the transfer.

The Court, in upholding the Civil Service Director's action, noted that "it would serve no useful purpose for the commission...to review the decision of the director if the school committee, the 'appointing authority' in the department to which the transfer was to be made, did not seek review of this decision by the director." Cooper, 314 Mass. at 82. It is clear from the holding in Cooper that voluntary transfers under §35 are made at the discretion of the Appointing Authority, pending the approval of HRD.

The statutory scheme does protect the employee from being transferred without his consent, but does not provide appeal rights when an Appointing Authority does not consent to the employee's requested transfer. There is simply no affirmative obligation on the part of the School Department to consent to a requested transfer.

For all of the above reasons, the Commission hereby orders the following:

- The appeal of John Quigley, CSC Case No. G2-11-23, is hereby dismissed based on Mr. Quigley's voluntary withdrawal;
- The appeals of Douglas Albert, CSC Case No. G2-11-20 and Virgilio Catalano, CSC Case No. G2-11-22, both of whom are permanent senior building custodians, are hereby dismissed based on lack of jurisdiction;
- The three remaining appeals of Dennis Martin, CSC Case No. G2-11-21, Scott Lanciani, CSC Case No. G2-11-24 and Daniel Evans, CSC Case No. G2-11-25, all permanent junior building custodians, will be scheduled for a full hearing. The purpose of the full hearing is to: 1) determine if the vacancy was filled a provisional appointment or a provisional promotion; 2) if the position was filled as a provisional promotion, were the Appellants "qualified" for the supervisory position of senior

building custodian; and 3) if any of them are “qualified”, what, if any relief, is warranted by the Commission pursuant to Chapter 310 of the Acts of 1993.

#### Civil Service Commission

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Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein, Commissioners [Marquis – Absent]) on March 10, 2011.

A True copy. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order or decision.

Notice to:

Melinda Willis, Esq. (for Appellants)  
Anne Marie Stoica (for Appointing Authority)  
Tsuyoshi Fukuda, Esq. (for HRD)